IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 30 (MS) OF 2006

1. Krishna Chandra Sah, S/o late Kailash Chandra Sah,
2. Smt. Tara Sah, W/o late Arun Kumar Sah,

Both R/o Mohalla Talla Kasum Almora, District-Almora.

.....Petitioner.

Versus

1. Civil Judge (Junior Division), Almora.
2. Anand Singh, S/o Ram Singh, R/o Kajanchi Mohhala, Almora, District Almora.
3. Smt. Neema Verma, W/o Sri Lal Mani Verma, R/o Talla Kasun, Almora, District – Almora.....Respondents.

Dated: 16.05.2006

Hon'ble Rajesh Tandon, J.

Heard Sri Yogesh Pacholia, Advocate for the petitioner and Sri R.C. Upadhyay, Advocate for the respondents.

By the present writ petition, the petitioner has prayed for setting aside the order dated dated 9th December, 2005 passed by the respondent no. 1.

Briefly stated, a suit was filed by the respondents no. 2 and 3 praying for permanent and mandatory injunction. During the pendency of the case, the Civil Judge, Junior Division, Almora has appointed an Advocate Commissioner for surveying the disputed property, who gave his report in favour of the plaintiff/respondents. Thereafter, the petitioners have also moved an application with the prayer that since the report of the Advocate Commissioner dated 31st May, 2005 was produced subject to the confirmation of the evidence, therefore, the Advocate Commissioner is required to be examined. The Civil Judge vide his order dated 9th December,

2005 has rejected the said application on the ground that no sufficient ground has been given by the petitioners so as to allow the application for examination of the Advocate Commissioner.

Petitioners have referred ***Smt. Vadda Rajeswaramma V Dr. V.L. Narasimha Charyulu and others AIR 1988 Andhra Pradesh Page 202,*** where the provisions of Order 26 Rule 10 C.P.c. has been interpreted to the extent that if an application is filed for examination of the Commissioner, the Court has no option and the petitioners cannot be deprived of examining the Commissioner. Paragraph 4 to that effect is quoted below:-

> *"4. Therefore, I am of the view that if an application is made for examination of Commissioner, the Court has no other opinion but to examine the Commissioner and in case such a request is not made by any of the parties then only the report of the Commissioner can be part of the record and be piece of evidence. However, if a request is made for the examination of the Commissioner, the report can become part of evidence only after the Commissioner is examined."*

I have perused the order passed by the court below. The court below has stated that no sufficient reason has been given in order to invoke the provisions of Order 26 Rule 10 of the C.P.C.

In view of the above, the petitioners are permitted to move a fresh application and the Civil Judge (Junior Division) after perusing the application shall pass necessary orders.

Subject to the aforesaid, writ petition is disposed of.

(Rajesh Tandon, J.)

16.05.2006
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